Study H-851 March 7, 2001

Memorandum 2001-31

Nonjudicial Dispute Resolution under CID Law: Discussion of Issues

INTRODUCTION

At its February 2001 meeting the Commission commenced its study of common interest ownership law by reviewing and making decisions concerning the scope of the study. The Commission decided to proceed on three fronts:

(1) To conduct a broadly comprehensive study of the area. For this purpose the staff will prepare a catalog of problems and possible solutions that have been identified.

(2) To learn more about the Uniform Common Interest Ownership Act, and whether it has any utility for California. The staff will prepare a memorandum that analyzes the act and its effect if adopted here.

(3) As a priority matter, to investigate nonjudicial dispute resolution mechanisms. This memorandum initiates discussion of nonjudicial dispute resolution issues in common interest ownership law.

Attached to this memorandum are the following materials:

BACKGROUND

In its review of the scope of the common interest development law study, the Commission heard a number of complaints about the powerlessness of the individual homeowner when a dispute with the association arises.

The thrust of many complaints was that the association is in a dominant financial and legal position in any dispute that arises. As a practical matter, if the homeowner believes the board is acting improperly, the only effective remedy available to the homeowner is to hire a lawyer. Perhaps the mere retention of

legal representation by the homeowner will sufficiently level the playing field to bring about a settlement of the dispute. Otherwise, it may be necessary for the homeowner to go to court to vindicate rights. This may be prohibitively expensive for the ordinary homeowner, and it should not be necessary to have questions concerning peoples' ordinary living arrangements resolved in court.

These concerns are reiterated in a letter from homeowners Don and Diana Schlesinger detailing their adverse experience litigating a dispute with their association board. They state, "With more and more communities run by homeowners associations, it is long overdue to design a non-judicial dispute resolution mechanism that would quickly and fairly resolve appropriate issues." Exhibit p. 5.

We understand that association-homeowner disputes typically fall into one of several categories:

(1) Financial disputes (maintenance, common charges, special assessments, fines and penalties, restrictions on resale or transfer, access to books and records).

(2) Architectural controls (repairs, alterations, painting, decor, landscaping).

(3) Pet issues (barking dogs, wandering cats, animal waste).

(4) Use of private space (leasing / subleasing, commercial or professional use).

(5) Personal interactions (facilities use, parking, noise, rudeness).

The staff has also observed that many of the worst disputes we have heard about have started as relatively minor disagreements that have escalated as the parties have taken entrenched positions. If the disputes could be resolved quickly and inexpensively, all parties would be better off.

Litigation involving these types of disputes generally involves filing a lawsuit and securing provisional relief (TRO and preliminary injunction), followed by a trial with damages and attorney's fees. The litigation option might cost $5,000 to $25,000. On the other hand, half-day mediation involving representatives of the homeowners' association and the owner could cost $1,000 to $1,500. A damning case against use of judicial procedures to resolve disputes of this nature is made in Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John's L. Rev. 75 (1999).

The scope report prepared for the Commission by Professor French concludes that California law governing common interest developments could be substantially improved by, among other changes, "providing more affordable and available means to ensure compliance with the law and resolve disputes

among CID members and boards." French, *Scope of Study of Laws Affecting Common Interest Developments* 8 (Nov. 2000).

The Commission decided to give this issue priority because it is possible that we could provide a significant immediate benefit to CID operations with a relatively simple and inexpensive nonjudicial dispute resolution remedy, apart from any other fundamental changes in the law that may be needed.

This memorandum is limited to nonjudicial dispute resolution techniques. That would include the concept of government-provided dispute resolution services. However, this memorandum does not consider the broader question of general government oversight of CID operations. In this connection, the staff notes the introduction of SB 419 (Torlakson), which would commission a study by the California Research Bureau of the possibility of creating a state-level oversight agency with wide-ranging powers.

EXISTING LAW

The Davis-Stirling Act includes a number of provisions relating to alternative dispute resolution. The key statutes are Civil Code Sections 1354 and 1366.3, the text of which is attached as Exhibit pp. 6-8.

The main ADR provision — Section 1354 — was added in 1994 in an effort to divert the growing number of minor disputes involving CC&Rs out of congested courts. It was intended to encourage ADR for disputes involving relatively minor issues, such as the height of fences, color of paint, number of vehicles, outbuildings, and similar disputes that characterize contemporary life in residential neighborhoods.

The Davis-Stirling Act also provides for a form of ADR in developer-association disputes (construction design and defect). Civ. Code § 1375. However, that is not the focus of the present inquiry, which relates to association-homeowner disputes.

Summary of Existing Provisions

The relevant provisions of existing law include:

(1) Mandatory ADR (Civ. Code § 1354(b)). Before either the association or an owner may file an action to enforce an association's governing documents (CC&Rs, bylaws, operating rules, etc.), the parties "shall endeavor" to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration, which may be binding or nonbinding at the option of the parties. This

process is initiated by a party serving a "Request for Resolution" on the other party. The request is deemed rejected if not accepted within 30 days (thereby enabling the requesting party to proceed to court). If the request is accepted, ADR must be completed within 90 days. If not completed within 90 days, apparently the parties may proceed to court. The parties bear the costs of the ADR.

This provision is limited in its application, however. It comes into play only if the action is solely for declaratory or injunctive relief (or for that type of relief in conjunction with a claim for damages not exceeding $5,000). It does not apply to a claim for association assessments, even if less than $5,000. Moreover, the court may excuse a party's failure to seek ADR in any of the following circumstances (Civ. Code § 1354(c)):

(a) Preliminary or injunctive relief is "necessary".

(b) The limitation period for bringing the action would have run within 120 days after the filing of the action.

(c) The court finds that dismissal for failure to request ADR would result in substantial prejudice to a party.

(2) Mandatory ADR for assessment disputes (Civ. Code § 1366.2). Although the mandatory ADR provisions of Section 1354(b) do not by their terms apply to assessment disputes, they may be invoked by a homeowner who pays under protest the amount of the assessment plus late charges, interest, delinquency costs. This procedure may not be used by the homeowner more than twice a year nor more than thrice in five years. It is not clear what a homeowner gains by invoking this procedure — it appears to simply delay the homeowner from going to court. It apparently would not enable the homeowner to recover attorney's fees if the homeowner prevails in court (see discussion below), since the attorney's fee provision applies only in an action to enforce covenants and restrictions. (Of course it is conceivable that an action to challenge the amount of an assessment could be considered an action to enforce covenants and restrictions. We have not seen any case law on this.)

(3) Mandatory ADR in governing documents. The Davis-Stirling Act does not address the issue of alternative dispute resolution (e.g., mandatory arbitration), that may be required in an association's governing documents. At least one provision of the Davis-Stirling Act suggests that such a requirement might be enforceable. See Section 1366.3(a) (association must inform owner who

pays assessment under protest of "any other procedures to resolve the dispute that may be available through the association".)

There is at least one recent case holding a mandatory arbitration clause in CC&Rs unenforceable because unconscionable. *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal. App. 4th 819, 102 Cal. Rptr. 2d 1 (2000). However, this was a clause limiting the association's right to sue the developer for design and construction defects. Different policy considerations would be implicated by a mandatory arbitration clause relating to association-homeowner disputes.

Department of Real Estate regulations relating to the contents of an association's governing documents indicate that the governing body should ordinarily be authorized to institute, defend, settle or intervene on behalf of the association in litigation, arbitration, mediation, or administrative proceedings in matters pertaining to enforcement of the governing instruments. 10 Cal. Code Regs. § 2792.8(26).

(4) Voluntary ADR (Civ. Code § 1354(d)). If either the association or an owner has filed an action to enforce the association's governing documents, the action may be stayed and the matter referred to ADR on written stipulation of the parties. Trial court delay reduction rules do not apply during the time the action is stayed. The parties bear the costs of the ADR.

(5) Attorney's fees (Civ. Code § 1354(f)). An incentive for the parties to agree to ADR is found in Section 1354(f), which assesses attorney's fees against the losing party in the event of a lawsuit. The statute also gives the court discretion, in determining the amount awarded, to "consider a party's refusal to participate in alternative dispute resolution prior to the filing of an action."

(6) Confidentiality of ADR communications (Civ. Code § 1354(g)-(h)). An added incentive for ADR is the confidentiality granted to ADR communications by Section 1354(g)-(h). These provisions were enacted before the Law Revision Commission's general mediation confidentiality statute (Evid. Code §§ 1115-1129); it is not clear whether the provisions are superseded by the general statute to the extent they apply to a mediation. These provisions would apparently still be good law to the extent they apply to an arbitration.

(7) Informing homeowners (Civ. Code § 1354(i)). The Davis-Stirling Act includes a mechanism for informing affected persons of its ADR provisions. Members of the association "shall annually be provided a summary of Section 1354." The law implies that the summary is to be provided by the association; the

law does not indicate whether there are any consequences to the association for failure to provide the summary or for providing an inaccurate summary.

(8) Attorney General intervention (Gov't Code § 8216). Various provisions of the nonprofit mutual benefit corporations law govern the operations of common interest developments under the Davis-Stirling Act. The Attorney General has authority under Corporations Code Section 8216 to intervene on behalf of members of the association who are denied certain rights by the association, including:

- Failure to hold regular meetings of members.
- Failure to allow a member access to books and records of the association.
- Failure to provide annual financial reports to members.
- Failure on request to provide a list of names and addresses of members.

Complaints may be submitted to the Attorney General's Public Inquiry Unit. After a review, the Attorney General will send, if appropriate, a "Notice of Complaint" letter with a copy of the complaint to the association, and direct the association to respond to both the Attorney General and the member within 30 days. The Attorney General is authorized by statute to go further, but does not ordinarily get involved beyond this. (This may be in part a funding issue.) However, the Public Inquiry Unit observes that, "Many times our 'Notice of Complaint' from this office will be sufficient to prompt an otherwise recalcitrant board of directors to resolve your complaint."

Evaluation of Existing Provisions

We have seen mixed reviews about the effectiveness of the nonjudicial dispute resolution mechanisms currently available to CIDs under California law.

Critics have noted that although existing law provides for alternative dispute resolution, when a member actually requests ADR, the law allows the board to refuse (and many boards do). There is no motivation for a board to prefer ADR over the courts since the board's decision is afforded presumptive validity in the court system. This forces the homeowner to file a lawsuit, which in most cases is beyond the homeowner's capability, particularly for the types of issues that may be involved in these disputes. We have received one comment to the effect that, "Boards of directors in most cases refuse ADR as they know the homeowner does not have the financial wherewithal to hire an attorney." (Samuel L. Dolnick, Memo 2001-19, Ex. p. 5).

Critics have also indicated that small claims court may be the homeowner's only practical remedy, but it is precisely the small claims cases that are subjected by the Davis-Stirling Act to the ADR requirement, providing a recalcitrant board the opportunity to delay litigation.

The "loser pays" provision for litigation under the Davis-Stirling Act should be an incentive for the parties to make use of ADR. But it has been suggested that, as a practical matter, this does not deter the board from litigation. Litigation is funded by the association (including assessments contributed by the dissident homeowner), so there is no strong motivation for the board to reach a nonjudicial resolution. Moreover, directors are immunized from personal liability for improper decisionmaking by both the law and mandatory insurance coverage paid by the association. In fact, it has been argued that professional managers and their lawyers encourage litigation because of the fees it generates.

In addition to these general concerns, a number of criticisms have been leveled at details of the Davis-Stirling ADR statute. See Sproul, *Alternative Dispute Resolution for Common Interest Developments: Recent Amendments to Civil Code Section 1354 Fall Short*, 12 Cal. Real Prop. J. 28 (1994). Defects identified by Mr. Sproul include:

(1) The statute fails to specify what sort of process will satisfy the ADR requirement. Is a due process hearing administered by the association sufficient?

(2) Although the ADR requirement is aimed at small cases, it is structured in such a way that large cases could be covered as well.

(3) The manner provided for service of an ADR request is cumbersome.

(4) The statute fails to limit the scope of judicial review of ADR.

(5) The times provided in the statute for completing ADR are unrealistic.

(6) Binding arbitration is risky because of the limited scope of judicial review.

(7) The attorney's fees provisions appear to be erroneously drafted.

(8) A party who refuses a request for ADR may be subject to attorney's fees, but it is not clear what actions amount to a refusal. If one party requests arbitration and the other counter-requests mediation, who has refused?

(9) Many cases are not amenable to mediation due to the intransigence of the parties.

On the other hand, we have heard that the alternative dispute resolution mechanisms of the Davis-Stirling Act have worked well in San Diego County. Evidently the San Diego Mediation Center is often used; it provides mediation services at a nominal cost.

MODELS FROM OTHER JURISDICTIONS

Is there successful experience in other jurisdictions with other nonjudicial dispute resolution models? Mollen notes that employment of arbitration and mediation techniques to resolve occupancy conflicts has generally been limited. 73 St. John's L. Rev. at 91. We present here a survey, though not an exhaustive one, of what we have so far discovered in other jurisdictions. For a short bibliography prepared for us by the Public Law Research Institute, see Exhibit pp. 1-2.

Mandatory Nonbinding Arbitration or Mediation

Florida Statute

Florida's statute imposing mandatory nonbinding arbitration or mediation for CID disputes has been in effect at least since 1992. See Fla. Stat. Ann. § 718.1255. There has been plenty of litigation under it.

The statute requires a person to petition for nonbinding arbitration before commencing litigation on any of the following issues:

(1) The authority of the board to control an owner's actions with respect to the owner's unit.

(2) The authority of the board to alter or add to a common area.

(3) The failure of the board to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or allow inspection of books and records.

As a prerequisite to arbitration, the petitioner must show that the respondent was given advance written notice of the specific nature of the dispute, a demand for relief, a reasonable opportunity to comply, and notice of the intention to proceed to arbitration or other legal action absent a resolution of the dispute. Provision is made for emergency relief if necessary. On agreement of the parties, the case may be diverted to mediation. Parties to a mediation are empowered to settle the dispute on the spot. The parties share equally the expense of mediation.

The arbitration is nonbinding. The prevailing party in an arbitration proceeding is awarded the costs of arbitration and a reasonable attorney's fee. If a party proceeds to court after a nonbinding arbitration and fails to recover a more favorable judgment, the party is responsible for all costs and expenses, including those of arbitration. If the judgment is more favorable, the plaintiff is entitled to costs and attorney's fees.

The Division of Florida Land Sales, Condominiums and Mobile Homes employs full-time attorneys to serve as arbitrators. A $50 filing fee is paid by the petitioner.

We have heard from Professor Rosenberry and from Tyler Berding of ECHO that experience with the Florida system has been mixed. That may be due in part to the fact that there appear to have been far more complaints than there is funding to cover.

Nevada Statute

Nevada prohibits an action relating to a CID's governing documents or assessments unless the dispute is first submitted for mediation or arbitration by filing a claim with the Real Estate Division of the Department of Business and Industry. Nev. Rev. Stat. Ann. § 38.310. The procedure is funded by the parties to the dispute. Statutes of limitations are tolled during the dispute resolution period. A party who seeks to have a binding arbitration award vacated or who commences judicial proceedings after a nonbinding arbitration, but who fails to obtain a more favorable award or judgment, is liable for the opposing party's attorney's fees.

Nonbinding Arbitration or Mediation on Demand

In Hawaii, any party to a **condominium** dispute may demand arbitration of the dispute, which is conducted pursuant to specified rules. Haw. Rev. Stat. Ann. § 514A-121. Evidentiary rules do not apply (except for rules governing privileged communications), and discovery may be limited. The procedure is available for interpretation, application, or enforcement of the association's governing documents, subject to certain limitations. The procedure is not available in actions to collect assessments that are liens or subject to foreclosure unless the owner first pays the assessment under protest. Haw. Rev. Stat. Ann. § 514A-90. The arbitrator has discretion to award costs. The arbitration is nonbinding. However, a party who requests a trial de novo and does not prevail is assessed litigation expenses. Haw. Rev. Stat. Ann. § 514A-127.

Hawaii also provides that, at the request of a party, a dispute involving a **cooperative housing corporation** is first submitted to mediation. If mediation fails, the dispute then goes to nonbinding arbitration. Haw. Rev. Stat. Ann. § 421I-9.

In the case of a dispute involving a **planned community association**, the dispute must first be submitted to mediation at the request of a party. If the matter is not resolved within two months, no further mediation is required. Haw. Rev. Stat. Ann. § 421J-13.

Permissive Dispute Resolution Clause in Governing Documents

Some states give an association discretion to include a nonjudicial dispute resolution clause in its governing documents.

Illinois, for example, makes clear that a condominium association may require mediation or arbitration of disputes that arise out of violations of the governing documents or that involve $10,000 or less (other than assessments). 765 Ill. Comp. Stat. Ann. 605/32-(a). Any arbitration is governed by the Illinois Uniform Arbitration Act. The association may require the disputants to bear the costs of mediation or arbitration under this statute.

Kentucky provides that the governing documents may include a procedure for submitting to arbitration or other impartial determination disputes arising from the administration of a condominium association. Ky. Rev. Stat. Ann. § 381.837(4).

Massachusetts permits the bylaws to provide for arbitration to resolve disputes arising from the administration of a condominium. Mass. Ann. Laws ch. 183A § 12(b).

Mandatory Dispute Resolution Clause in Governing Documents

New Jersey mandates that planned real estate developments "shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation." N.J.S.A. 45:22A-44(c). The scope of this requirement is not clear. Suppose the board creates an in-house dispute resolution process, consisting of an opportunity for the aggrieved homeowner to present the homeowner's case to a single member of the board, with an appeal right to the full board. Would this satisfy the requirement?

Newly enacted **Michigan** legislation requires the bylaws to contain an arbitration provision, but makes arbitration subject to agreement of the parties. Once the parties have agreed to arbitration, the arbitration is binding. Mich. Cons. Laws Ann. 559.154(8)-(10).

Due Process Hearing

Maryland has a statutory process that it identifies as a "dispute settlement mechanism", but is really a due process requirement. See Md. Code Ann. § 11-113. The statute precludes the board from imposing a fine or infringing on a right of an owner or occupant for a rule violation unless the board has first (1) notified the person of the violation and provided a 10-day opportunity to abate without penalty, (2) notified the person of a hearing on the matter by the board, (3) and held a hearing at which the person may present evidence and cross-examine witnesses. The board's decision is appealable to the state courts.

It should be noted that this statutory process applies "unless the declaration or bylaws state otherwise." Md. Code Ann. § 11-113(a).

Ombudsman

Nevada Ombudsman for Owners in Common Interest Communities

Nevada has created a state office of Ombudsman for Owners in Common Interest Communities. Rev. Stat. Ann. § 116.1116. The office is within the Real Estate Division of the Department of Business and Industry. It has the following responsibilities:

(1) To assist in processing claims submitted for mediation or arbitration pursuant to Nevada's mandatory ADR statute (see discussion above).

(2) To assist owners to understand their rights and responsibilities, including publishing materials relating to rights and responsibilities of homeowners.

(3) To assist board members to carry out their duties.

(4) To compile a registry of CID associations.

The Ombudsman is funded by a $3 annual assessment on homeowners. The office was activated in late 2000, and has a three person staff. It handles 1,000 calls a month.

Despite a fairly limited statutory mandate, we understand that the Nevada Ombudsman fields complaints and mediates disputes between homeowners and their associations. This includes complaints about foreclosures, selective enforcement, embezzlement, and obstruction of information to homeowners.

Although the Nevada Ombudsman has only been in operation a short while, it has already received mixed reviews. Some have said the Ombudsman has been effective. Others have complained that the Ombudsman is at cross purposes with the Administrator of the Real Estate Division. It has also been alleged that the

office has not been adequately staffed due to collusion with the management industry. There is confusion over whether the office serves the homeowners or the managers. There are suggestions that the office be relocated so that it is within the Office of Attorney General or the Department of Consumer Affairs, or even replaced with local-level independent commissions. In favor of restructuring, it has been argued that independence from the state, a local focus, and more adequate enforcement powers are necessary.

Great Britain Housing Ombudsman

Great Britain has a Housing Ombudsman. The jurisdiction of that office does not cover the British equivalent of CID housing; however, it does cover similar community housing issues arising out of the landlord-tenant relationship in what are basically public housing complexes. The Ombudsman receives tenant complaints and resolves them free of charge.

The office is funded by a fee that is the equivalent of 60 cents per year for each unit of housing. There are 1.5 million housing units in the system, which would yield an annual budget for the Housing Ombudsman's office amounting to $900,000. The office has a staff of 17.

The office reports its current annual caseload as 1,800 complaints. This represents a substantial increase over earlier years and has caused a backlog in the office.

The office uses a number of dispute resolution techniques, including informal intervention, formal inquiry, mediation, arbitration, and final recommendation. It rarely conducts hearings, performing most of its work on the basis of paper submissions. The operation appears to have been successful, keeping the bulk of these disputes out of court.

The office has quasi-judicial powers. Its final recommendations are determinative, but are judicially reviewable.

An effort is currently being made to adapt this system for use in the British equivalent of CIDs. We understand that an early initial decision in adapting the system is that it will not be used to resolve maintenance assessment disputes.

California Mobilehome Ombudsman

California's Mobilehome Ombudsman (in the Department of Housing and Community Development) takes and helps resolve complaints from the public relating to manufactured homes and mobilehomes, including titling and

registration, installation, warranties, financing, sales, and inspection problems. Health & Safety Code § 18151. The Ombudsman does not arbitrate, mediate, negotiate, or provide legal advice on mobilehome park rent disputes or other issues involving the Mobilehome Residency Law (the equivalent of the Davis-Stirling Act for mobilehome parks), but may provide information on these issues. Section 18151(c).

Thus the Mobilehome Ombudsman handles questions and concurs regarding the Civil Code as follows:

(1) If a complainant requests residency law information only, the ombudsman assists over the phone and sends a copy of the law.

(2) If a complainant requests complaint processing assistance with a problem other than rental agreements or rent disputes, a complaint form will be sent to the complainant.

(3) When a complaint form is received and it contains a residency law issue, a copy of the complaint is sent to the park manager for resolution. The Ombudsman does not participate any further.

Legislation introduced this session — SB 122 (Dunn, Chesbro, and Sher) — would expand the office, step up its activities, and provide an appropriation for that purpose.

Legal Advice

Great Britain has a Leasehold Advisory Service. This is an independent advice agency. Its purpose is to provide legal advice concerning housing disputes to anyone who asks for it.

The agency is funded by a combination of government and private funding. It is staffed by lawyers. It is overseen by a board consisting of representatives of all stakeholders in the housing market.

The concept of this operation is that many disputes are not settled because parties are unaware of, or have a mistaken conception of, their legal rights. By providing independent legal advice to all, the agency helps people involved in disputes understand their legal rights better, which in turn makes them more realistic in coming to a resolution of their differences.

Administrative Adjudication (with Mediation)

Montgomery County (Maryland) and Queensland and New South Wales (Australia) have adopted comprehensive and well-documented schemes for nonjudicial resolution of CID-type disputes.

Montgomery County, Maryland

Montgomery County, Maryland, has by ordinance adopted a complete scheme for nonjudicial resolution of CID disputes. The scheme was established in 1991, following a task force study that identified a number of major concerns and issues, including inequality of bargaining power and the need to provide for due process in fundamental association activities. The law creates a county Commission on Common Interest Communities that, among other activities, seeks to reduce the number and divisiveness of disputes, provide and encourage informal resolution of disputes, or (if necessary) conduct formal hearings. The Commission on Common Interest Communities law is found at Chapter 10B of the Montgomery County Code.

The Commission is composed of 15 voting members appointed by the County Executive, consisting of six CID residents, six CID professionals, and three real estate professionals. It also has non-voting designees of heads of major county departments (including planning, environment, public works, transportation, housing, and community affairs).

There is a well-articulated dispute resolution process. A dispute may not be filed with the Commission until the parties have made a good faith attempt to exhaust all procedures provided in the association documents, and at least 60 days have elapsed since those procedures were initiated. The Commission has jurisdiction to handle disputes involving:

• The authority of the board under the law or governing documents of the association to (1) require a person to take any action involving a unit, (2) require a person to pay a fee, fine, or assessment, (3) spend association funds, or (4) alter or add to a common area.

• The failure of the board to (1) properly conduct an election, (2) give adequate notice of a meeting, (3) properly conduct a meeting, (4) properly adopt a budget or rule, (5) maintain or audit books and records, or (6) allow inspection of books and records.

When an association learns of a dispute, it must notify the parties of the right to file with the Commission. An association may not take further action on the

dispute until 14 days after the notification and, once the dispute has been filed with the Commission, may take no further action until it has been resolved by the Commission. Nor may the courts act on the matter until it has been resolved. The Commission is allowed a minimum of 90 days to resolve a dispute.

The Commission will provide mediation services to the parties on request. If mediation fails, or is rejected by a party, the dispute goes to a hearing.

The hearing is held before a panel appointed by the Commission Chair. It consists of one residential member of the Commission, one Commission member from one of the other represented groups, and an outside volunteer selected by the two members who has arbitration experience. The arbitrator chairs the hearing panel.

Alternatively, the Commission Chair may refer the matter (or the parties may agree) to a County hearing officer; in that case the hearing officer's decision is subject to review by a hearing panel.

The hearing is conducted pursuant to standard county administrative hearing procedures. The Commission may compel production of books and records and attendance of witnesses, and may invoke the court's contempt power. The hearing panel may resolve the dispute, may award damages, and may award costs and attorney's fees in appropriate situations. Its decision is binding on the parties.

The hearing panel's decision is subject to judicial review on three grounds only — the decision does not comply with law, it is not supported by substantial evidence, or it is arbitrary and capricious. The court may award costs and fees. A failure to comply with the decision is a civil offense, and the decision is enforceable by the full enforcement mechanisms of the county, including the County Attorney.

The authority of the county to act in this area, including its authority to limit the jurisdiction of the courts, is not clear to us. However, we are unfamiliar with general Maryland law.

The dispute resolution process has been quite successful, from what we have heard. However, we have not yet managed to gather statistics on it. We will provide that type of information to the Commission at or before the Commission meeting if we are able to obtain it by then.

Queensland, Australia

Queensland has a mandatory nonjudicial dispute resolution scheme. The Queensland scheme applies to "community titles." It is run by a Commissioner, who also provides information to the public about the statute and about the dispute resolution process.

Under the Queensland scheme, a dispute must be submitted to the Commissioner. The Commissioner reviews the papers and decides on an initial case management recommendation. The Commissioner has four referral options: (1) mediation by a dispute resolution center, (2) mediation by a specialist (if the material is too complex for a mediator at the dispute resolution center), (3) departmental adjudication, or (4) specialist adjudication (if the material is too complex for a departmental adjudicator).

If the referral is to mediation by a dispute resolution center, there is no charge to the applicant. Mediation by the dispute resolution center is a free service provided by the Department of Justice. If mediation fails to resolve the dispute, the applicant can proceed to administrative adjudication. Judicial review of administrative adjudications under this scheme is limited to questions of law.

We do not know the annual cost of running this program. The most recent statistics indicate the program averages 720 applications for dispute resolution annually. Of these, we do not know how many are settled by mediation and how many by administrative adjudication. We understand a review of the statute has recently been completed, and results may be available soon. Professor Rosenberry has indicated her understanding that the cost of the Queensland system is very low and the program has been highly successful.

New South Wales, Australia

New South Wales has a comprehensive dispute resolution process for "strata titles" (including condominiums) through an administrative agency. The agency (Strata Schemes & Mediation Services) includes a commissioner, four full-time mediators, adjudicators, and an appeals board. The agency provides governmental oversight and public information, as well as dispute resolution services, and employs five customer services officers who provide free information to the public on the governing laws. The agency is funded by the state.

Under this system a person seeking to obtain an enforceable order from an adjudicator must submit the matter to mediation. A mediation applicant pays a

filing fee the equivalent of $28 (US). The fee covers only administrative handling costs. A mediation application requires two to four weeks to process; the parties may find and pay for an independent mediator if they choose.

If mediation fails, or it is determined the subject matter is inappropriate for mediation, the matter goes to an adjudicator for resolution. Mediation is considered inappropriate if any party objects.

An adjudicator's decision is made without a hearing, on the basis of submissions of the parties. The process typically takes six to 10 weeks. The adjudicator's order is subject to review by an appeals board, using an administrative hearing format. The board's findings of fact are nonreviewable. Judicial review of the board's decision is limited to questions of law.

Before the mediation requirement took effect in 1997, administrative adjudication applications under this system averaged 1300 annually. Since the new system became operative, applications for mediation have averaged 830 annually. (Apparently the remaining disputes still go directly to adjudication, mediation being inappropriate.) Mediation has experienced a 58.5% success rate.

Information is currently being gathered concerning parties' satisfaction with this process. The information will not be available for a few weeks, but preliminary results indicate a high level of satisfaction. Of the parties surveyed, 85% felt the process was fair and 81% said they'd use it again. (This is significant because only 64% of those surveyed had successfully reached a mediated agreement). Only 4% of those surveyed ultimately proceeded to adjudication, even though 36% had an unsuccessful mediation (failure to achieve an agreement).

CONCLUSION

General Considerations

It is of course possible to combine various nonjudicial dispute resolution devices into one unified scheme, and some jurisdictions do. For example, an ombudsman could provide information about legal rights and duties to the disputants, assistance in obtaining ADR services, and perhaps act as an administrative adjudicator of the dispute if other resolution efforts fail.

One general question is whether any sort of nonjudicial dispute resolution ought to be made mandatory. Deborah Hensler, a professor of dispute resolution on the Stanford Law School faculty, has indicated to the staff that use of

voluntary procedures to resolve disputes in this area is obviously beneficial. But she is skeptical about mandating nonjudicial procedures. Arbitration is confusing to many persons, including lawyers, who do not necessarily understand the procedures and details involved and the rights being given up in the process. And mediation, by its nature, cannot work unless it is voluntary.

A general problem with any sort of nonjudicial resolution system is cost. Experience in California with either an annual fee (e.g., $1 per residential unit per year) or a general fund appropriation (e.g., $1 million annually) would suggest that such a provision could be difficult politically to enact. (In the case of a unit assessment, there are also logistical problems with collection, including Proposition 13 issues and state mandated local program issues if it is done through the property tax system.) Requiring the parties to a dispute to fund it is an option if the program is successful and avoids cases going to court; but if the program yields mixed results, then it may simply add more burden to an already unwieldy dispute resolution system.

It is instructive that last session a bill to upgrade the operation of California's Mobilehome Ombudsman was vetoed for funding reasons. The Governor's veto message reads:

> The bill would establish a new Mobilehome and Manufactured Home Ombudsman Fund and require (until January 1, 2004) redirecting annual deposits of $145,000 of specified mobilehome and manufactured home registration fees into the new fund. The new use of these fees is inconsistent with the intent of the Mobilehome Park Resident Ownership Program (MPROP).
>
> While I am concerned about the conditions in mobilehome parks and manufactured home communities, funding for a Mobilehome and Manufactured Home Ombudsman program is not included in the current budget. This program should compete with all other meritorious programs during the annual budget process.

The bill has been reintroduced this session as SB 122, with an appropriation in an unspecified amount. We will follow its progress.

It is clear that funding concerns are not the only political considerations with nonjudicial dispute resolution mechanisms in this area. One need only look as far as the Davis-Stirling Act to observe the results of contending forces in the Legislature. "Mandatory" ADR under the Davis-Stirling Act is limited in scope and is inapplicable if the demand for ADR is rejected by a party. Civ. Code § 1354.

Dispute resolution schemes typically exclude assessment challenges from their operation. The apparent reason for this is that assessments are ordinarily applied uniformly throughout the CID, and are based on the board's judgment of the amount necessary to adequately operate and maintain the CID. This is a determination vested by the association in the board. What would be the consequence for this scheme, and for the rest of the community, if an individual owner could obtain a lower assessment by engaging the board in mediation or arbitration?

Mediation

The staff has consulted with Gregory Weber, a law professor and a mediator with the California Center for Public Dispute Resolution. Prof. Weber indicates that mediation can be most successful where a number of key factors are present, including:

(1) Discernible issues.
(2) Potential areas for agreement (multiple issues helpful).
(3) Identifiable parties.
(4) Parties anticipate future dealings with each other.
(5) Relative balance of power between the parties.
(6) Realistic time frame for resolving dispute.
(7) External pressures on parties to reach agreement.
(8) Litigation a poor alternative.

Association-homeowner disputes would seem to be a fit for many of these factors, although some may be problematic, including: (3) identifiable parties (board may be speaking for an individual or for a majority of homeowners), (5) balance of power, and (7) external pressures (although there may be some from within the community).

The main factor in successful mediation is the willingness of the parties to participate. Otherwise, some other system, such as arbitration, will provide a more appropriate dispute resolution mechanism.

In addition, it is important that the mediator be a neutral. This would argue for going outside the association, for example to a county mediation center or a state-operated mediation service.

The American Arbitration Association has reported a success rate of 75-90% in the mediations it conducts. However, it is not clear whether the actual percentage for homeowner association disputes falls within this range.

Ombudsman

Persons who have communicated with the Commission have expressed substantial interest in the ombudsman concept. Cara Black has suggested, for example, that homeowners could be protected from unnecessary lawsuits by having an ombudsman based out of the Department of Consumer Affairs. "This could be paid for by collection of a $2.00 per homeowner fee. With six million homeowners living in HOA's it could pay for this position as well as a staff." See Memo 2001-19, Ex. p. 46. See also the comments of Alisa Ross ("Nevada has already put in place an ombudsman for homeowners and considering placing the position under their Consumer Affairs Division." Memo 2001-19, Ex. p. 79).

Charles Egan Goff has suggested an ombudsman within the homeowners association — some sort of due process against directors, an independent group to decide disputes, and a separate group to propose amendments to CC&Rs, house rules, etc. 1st Supp. Memo 2001-19, Ex. p. 12. Skip Daum, on behalf of the Community Associations Institute, indicates that the concept of an ombudsperson for community associations should be considered. He raises the questions of how such a position would be funded, and whether it would be efficacious or practical. 1st Supp. Memo 2001-19, Ex. p. 8.

On the other hand, Helen Mullally is skeptical of the concept. "This is just another diversion to delay anyone thinking seriously of regulating CAI's managers." 2d Supp. Memo 2001-19, Ex. p. 3.

Samuel L. Dolnick identifies eight areas where California has already authorized ombudsmen, including in mobilehomes and mobilehome parks. He notes successful experience under at least one of these programs (Long-Term Care Ombudsman Program), and thinks they could also be beneficial for CIDs. See Memo 2001-19, Ex. pp. 3-4.

Other Options

Options that might also merit more careful exploration include:

(1) Funding the Attorney General's office to take a more active role in complaint investigation and resolution.

(2) "Med/arb" systems (such as beginning with standard mediation but converting it into an arbitration in case of failure to reach agreement).

(3) Administrative adjudication of disputes by a state agency, either existing or created for that specific purpose. In this connection, we have heard from Mr. Goff that the Real Estate Commission should not adjudicate board versus

homeowner disputes. "That Commission at least appears strongly favorable to real estate interests. Any adjudicative body should not only be but also appear to be completely independent." Exhibit p. 4.

(4) Some sort of court-run "early neutral evaluation" of cases, such as we find in the federal court system, which gives the parties a realistic perspective on their chances in court and perhaps increases the likelihood of settlement. This is analogous to the "legal advice" office used in Great Britain.

(5) Facilitate use of neighborhood mediation programs in operation in many communities, or foster their creation in conjunction with CIDs.

Commission Action

The Commission needs to decide whether any of the models outlined above appear promising enough for California that we ought to pursue them further. Options would include improving some of California's existing remedies, adapting a program that has proved successful elsewhere, creating a hybrid with the best features of each, or some other yet untried approach.

The staff would be wary of spreading our resources too thinly in this area and going off in too many directions at once. One of the reasons the Commission decided to prioritize this particular matter was the thought that it could provide some real and immediate improvement for board-homeowner disputes by means of an effective nonjudicial dispute resolution procedure. That would suggest relatively straightforward means of processing disputes through ADR without, at least at this point, getting into creation of new government bureaucracies or funding schemes. On the other hand, the concept of an ombudsman, or a dispute-resolving entity such as the one in Maryland's Montgomery County, has undeniable attractions.

If nothing else, the Commission should at least clean up mechanical problems in the Davis-Stirling ADR scheme (including clarification of the interrelation of its confidentiality provisions with the general Evidence Code mediation confidentiality provisions).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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Common Interest Developments - Alternative Dispute Resolution

BIBLIOGRAPHY

Prepared by Kara Brown, Research Fellow in Public Law
February 13, 2001

Relevant California Statutory Provisions:

Cal. Civil Code § 1354 (West 2000); Cal. Civil Code § 1366.3 (West 2000).

Treatises:

"Alternative Dispute Resolution," 4 Witkin, Summary of Cal. Law (9th ed., 2000 supp.) Real Prop., § 328B, p.273 (discussing expansion of Cal. Civil Code § 1354 to encourage parties to disputes involving enforcement of governing documents of a common interest development to attempt alternative dispute resolution).

California Common Interest Developments: Law and Practice, Ch. 21, "Liability and Litigation Issues for Owners Associations, §§21:107-117 (2000).

3 Cal. Jur. 3d Real Estate § 1333 (1999) (discussing alternative dispute resolution and Cal. Civil Code § 1354).

Other State Statutes regarding ADR in the context of common interest development disputes *(not an exhaustive list[1]):*

Fla. Stat. Ann. § 718.112(k) (2000) (mandating a provision in the by-laws for binding arbitration); Fla. Stat. Ann. § 718.1255 (2000) (setting out general provisions for use of alternative dispute resolution mechanisms).

Haw. Rev. Stat. Ann. §514A-121(a) (2000) (requiring dispute of cooperative by-laws to be submitted to mediation).

Some states provide the association with the discretion to include such clauses within the governing documents:

Ill. Ann. Stat. ch. 765 para. 605/32-(a) (2000) ("The declaration or by laws of a condominium association may require mediation or arbitration of disputes in which the matter in controversy has either no specific monetary value or a value of $10,000 or less").

Ky. Rev. Stat. Ann. § 381.837(4) (2000) (stating that "[t]he master deed may provide . . . [a] procedure for submitting the disputes arising from the administration of the condominium to arbitration or other impartial determination").

Mass. Ann. Laws ch. 183A§§ 12(a)(b) (2000) (permitting the by-laws to provide for arbitration to determine the fair market value of a condominium unit and to resolve "disputes arising from the administration of the condominium").

[1] This list is taken from Scott Mollen, Alternative Dispute Resolution of Condominium and Cooperative Conflicts, 73 St. John's Law Review 75, 96 n.96 (1999).

Other states have created specific mechanisms to encourage alternative dispute resolution:

See Nev. Rev. Stat. Ann. § 116.1116 (1999) (creating office of ombudsman for owners in common-interest communities within the real estate division of the department of business and industry); see also, Nev. Rev. Stat. Ann. § 38.300 to 38.360 (1999) (mediation and arbitration of claims relating to residential property within common-interest community).

Law Review Articles:

Scott E. Mollen, Alternative Dispute Resolution of Condominium and Cooperative Conflicts, 73 Saint John's Law Review 75 (1999).

Curtis C. Sproul, Alternative Dispute Resolution for Common Interest Developments: Recent Amendments to Civil Code Section 1354 Fall Short, 12 Cal. Real Prop. J. 28 (1994).

Laura C. Trognitz, Yes, It's My Castle: Suits by Unhappy Residents Against Homeowners' Associations Grow, 86 ABA Journal 30 (June 2000).

Miscellaneous:

Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 980 P.2d 940 (Cal. 1999) (adopting a rule of judicial deference to community association board decision-making that applies when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors).

Judge (Ret.) Charles Egan Goff
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February 7, 2001

Professor Susan F. French
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Dear Professor French:

Thank you for your Background Study re CIDs and your presentations to the Commission last Friday.

As a homeowner in an HOA I've been greatly concerned about CIDs and the rules that supposedly govern them. It's not possible for me, as a judge, to comprehend what's happened and how in our own HOA and that such things can occur in Our Country.

The Friday meeting was advised that a large percentage of CID homeowners were satisfied with the power arrangements in their ass'ns. The obvious I had not considered: many, possibly most, HOAs have conscientious directors who treat owners fairly and with respect. Also often what directors do unfairly to one or a few owners is not made known to other owners who remain satisfied with that board's actions. That realization reminded me immediately of Justice Scalia's stunningly brilliant and prophetic dissent in Morrison v Olson, the decision approving the appointment of special prosecutors: "But the fairness of a process must be adjudged on the basis of what it permits to happen, not on what it produced in a particular case." (101 L. Ed. 2d 569, 631; 1988.) This is clearly akin to Justice Harlan's statement in Maxwell v Dow (1900) 176 U.S. at 617: "Liberty, it has been well said, depends not so much upon the absence of actual oppression as on the existence of constitutional checks upon the power to oppress." So far no one, including the courts, has found such constitutional checks on oppressive CID boards. Nor on boards of homeowner ass'ns which are not CID ass'ns. Although many boards act justly, the way the CID laws are designed permits unjust, and I'm certain at least occasional illegal, board oppression.

Our Constitution's answer: Separation of Powers. This appears effective although not perfect by any means. I found serious political opposition to that concept during my time as an elected judge. Human Nature requires such separation to avoid oppression. Even the Bible (which I cite only for its wisdom) refers to human weakness, attributing to God these words: "...the devisings of man's mind are evil from his youth" (Gen. 8:21) and His

warning to the Isrealites, who demanded a king to rule and judge them, that a king would in effect enslave them: "...and ye shall be his servants." (1 Sam. 8:6-17.) Contra this position: "Surely every man will have advisers by his side, but the decision will be made by one man." (A. Hitler, Mein Kampf, vol. II, ch. 4, emph. in original) and ..."the Supreme Soviet must systematically control the activities of ministries, departments, and economic councils; they must actively contribute to the implementation of the decisions adopted by the Supreme Soviet ..." (Draft of Programme of the Communist Party of the Soviet Union, Moscow, 1961, pp. 86-87); "The Soviet power, by combining the legislative and executive functions in a single body..." ties the proletariat with the apparatus of state administration. (Stalin, Foundations of Leninism, Int'l Publishers, N.Y. 1939). Andre Vyshinsky, chief prosecutor at the 1938 Moscow Purge Trials in 1938, and later Soviet foreign minister, in his Law of the Soviet State declared that there is a firm and indissoluble bond linking the Office of the State Prosecutor with the judiciary of the USSR.

So much for separation of powers--no more can be said to prove its essential nature than the opposition of dictators. The complaints we have all heard, and which I have re the HOA in which my wife and I live, are due to the design of the law now governing CIDs "... and what it permits to happen...", uncontrolled power in the hands of a small group of "directors".

May I also state opposition to having the Real Estate Commission or any executive body adjudicate board v. homeowner disputes. That Commission at least appears strongly favorable to real estate interests. Any adjudicative body should not only be but also appear to be completely independent.

Thank you again for your report, your presentations last Friday, and your continued work toward Americanizing neighborhood ass'ns.

Charles Egan Goff

February 25, 2001

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ATTN: Nathaniel Sterling
Executive Secretary

Dear Mr. Sterling:

As victims of homeowner board abuse, we would definitely support a revision in common-interest-development law. With more and more communities run by homeowners associations, it is long overdue to design a non-judicial dispute resolution mechanism that would quickly and fairly resolve appropriate issues.

Much to our amazement, the homeowner has NO rights in our courts where current law strongly favors association boards and their legal representatives. This even went so far as to apply to the inside of our home where non-safety construction issues were taken from our control and allowed workers to enter our home unauthorized.

After spending several thousand dollars, time and the indignity of having our home virtually reduced to an unlivable state, we realized we were on the losing end and had no where to turn. The judge in our case advised us to just give up, let the board have full control of our property and stop wasting any more of our money.

Yes, we would definitely support any change in the law that would spare others from going through what we suffered.

Please let us know if we can be of assistance in helping amend current law.

Most sincerely,

Don & Diana Schlesinger

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SELECTED PROVISIONS OF DAVIS-STIRLING ACT

Civ. Code § 1354. Enforcement of convenants and restrictions

1354. (a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars ($5,000), related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for Resolution shall include (1) a brief description of the dispute between the parties, (2) a request for alternative dispute resolution, and (3) a notice that the party receiving the Request for Resolution is required to respond thereto within 30 days of receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as prescribed for service in a small claims action as provided in Section 116.340 of the Code of Civil Procedure. Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.

(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages not in excess of five thousand dollars ($5,000), related to the enforcement of the governing documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to

Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties.

(d) Once a civil action specified in subdivision (a) to enforce the governing documents has been filed by either an association or an owner or member of a common interest development, upon written stipulation of the parties the matter may be referred to alternative dispute resolution and stayed. The costs of the alternative dispute resolution shall be borne by the parties. During this referral, the action shall not be subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.

(e) The requirements of subdivisions (b) and (c) shall not apply to the filing of a cross-complaint.

(f) In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action.

(g) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), evidence of anything said or of admissions made in the course of the alternative dispute resolution process shall not be admissible in evidence, and testimony or disclosure of such a statement or admission may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(h) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), documents prepared for the purpose or in the course of, or pursuant to, the alternative dispute resolution shall not be admissible in evidence, and disclosure of these documents may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(i) Members of the association shall annually be provided a summary of the provisions of this section, which specifically references this section. The summary shall include the following language:

"Failure by any member of the association to comply with the prefiling requirements of Section 1354 of the Civil Code may result in the loss of your rights to sue the association or another member of the association regarding enforcement of the governing documents."

The summary shall be provided either at the time the pro forma budget required by Section 1365 is distributed or in the manner specified in Section 5016 of the Corporations Code.

(j) Any Request for Resolution sent to the owner of a separate interest pursuant to subdivision (b) shall include a copy of this section.

Civ. Code § 1366.3. Alternative dispute resolution for assessments

1366.3. (a) The exception for disputes related to association assessments in subdivision (b) of Section 1354 shall not apply if, in a dispute between the owner of a separate interest and the association regarding the assessments imposed by the association, the owner of the separate interest chooses to pay in full to the association all of the charges listed in paragraphs (1) to (4), inclusive, and states by written notice that the amount is paid under protest, and the written notice is mailed by certified mail not more than 30 days from the recording of a notice of delinquent assessment in accordance with Section 1367; and in those instances, the association shall inform the owner that the owner may resolve the dispute through alternative dispute resolution as set forth in Section 1354, civil action, and any other procedures to resolve the dispute that may be available through the association.

(1) The amount of the assessment in dispute.

(2) Late charges.

(3) Interest.

(4) All fees and costs associated with the preparation and filing of a notice of delinquent assessment, including all mailing costs, and including attorney's fees not to exceed four hundred twenty-five dollars ($425).

(b) The right of any owner of a separate interest to utilize alternative dispute resolution under this section may not be exercised more than two times in any single calendar year, and not more than three times within any five calendar years. Nothing within this section shall preclude any owner of a separate interest and the association, upon mutual agreement, from entering into alternative dispute resolution for a number of times in excess of the limits set forth in this section. The owner of a separate interest may request and be awarded through alternative dispute resolution reasonable interest to be paid by the association on the total amount paid under paragraphs (1) to (4), inclusive, of subdivision (a), if it is determined through alternative dispute resolution that the assessment levied by the association was not correctly levied.